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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 140, Miscellaneous

SIMON ADAMS,
Petitioner

v.

STATE OF TEXAS,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

	Page
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2
POINT ONE	4
In a prosecution in a state court for a state crime, an infringement of the privilege against self-incrimination does not violate the due process clause of the Fourteenth Amendment.	
Argument and Authorities	4
POINT TWO	11
Even if a right secured by the Constitution of the United States had been denied by the proceedings in the state courts, it would not be subject to review in this case, because petitioner did not assert a federal constitutional right in the state courts.	
Argument and Authorities	11
CONCLUSION	12
APPENDIX	13

TABLE OF AUTHORITIES

CASES	Page
Adamson v. California, 332 U.S. 46	8, 10
Baldwin v. Kansas, 129 U.S. 52	12
Barrington v. Missouri, 205 U.S. 483	10
Brinkerhoff-Faris Trust and Savings Co. v. Hill, 281 U.S. 673	10
Brooks v. Missouri, 124 U.S. 394	12
Commercial Bank of Cincinnati v. Buckingham's Executors, 5 How. 317	10
Dewey v. Des Moines, 173 U.S. 193	12
Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U.S. 157	10
Franklin v. South Carolina, 218 U.S. 161	10, 11
Iowa Central Ry. v. Iowa, 160 U.S. 389	10
King v. West Virginia, 216 U.S. 92	10
Leeper v. Texas, 139 U.S. 462	12
Lloyd v. Matthews, 155 U.S. 222	10
Los Angeles Farming and Milling Co. v. Los Angeles, 217 U.S. 217	10
McNulty v. California, 149 U.S. 645	10
Mellon v. O'Neil, 275 U.S. 212	12
Mooney v. Holohan, 294 U.S. 103	10
Neblett v. Carpenter, 305 U.S. 297	10
New York Life Ins. Co. v. Hendren, 92 U.S. 286	12
Oxley Stave Co. v. Butler County, 166 U.S. 648	12
Palko v. Connecticut, 302 U.S. 319	7, 10
Rogers v. Peck, 199 U.S. 425	10
Southwestern Bell Telephone Co. v. Oklahoma, 303 U.S. 206	12
Twining v. New Jersey, 211 U.S. 78	5, 10
Whitney v. California, 274 U.S. 357	12

CONSTITUTIONAL PROVISIONS	
United States Constitution, Art. XIV	5, 7

STATUTES	
Texas Civil Statutes (Vernon 1948)	
Art. 6687b, Sec. 39	4, 13
Sec. 42	4, 5, 13
Art. 6701d, Sec. 44	4, 13
Sec. 47	4, 13
Texas Code of Criminal Procedure (Vernon 1948)	
Art. 1239	14
Art. 1240	15

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PRELIMINARY STATEMENT

Petitioner was charged by information and convicted of negligent homicide of the second degree in the county court at law in Harris County, Texas. Upon appeal to the Court of Criminal Appeals of Texas, the conviction was affirmed and a motion for rehearing was overruled. 221 S. W. 2d 265 (1949). (R. 54a, 72.)

Petitioner assigns as error (1) "the admission in evidence of an alleged confidential (oral) report by petitioner to two officers acting as traffic investiga-

tors, . . . such evidence being expressly made inadmissible in any criminal case by Article 6687b of the Revised Civil Statutes of Texas," and (2) "a failure to prove by direct, or circumstantial evidence, an essential element of the offense, to-wit, committing a misdemeanor by driving an automobile in excess of 30 miles per hour, where the statutory offense charged was negligent homicide of the second degree." Because of such alleged errors, the petitioner asserts that "due process of law, which the Fourteenth Amendment exacts from the States, as a conception of fundamental justice, was not satisfied."

It is submitted that this case is not a proper one for review by this Court, because (1) the action of the Texas courts did not constitute a violation of any federal constitutional right and (2) petitioner did not set up or claim any right, privilege, or immunity under the Constitution of the United States either in the trial court or in the appellate court.

STATEMENT OF THE CASE

Petitioner was charged by information with having committed certain unlawful acts, namely, (a) operating an automobile within the corporate limits of the City of Houston "at a greater rate of speed than thirty miles per hour and (b) failing to stop his automobile at a stop sign at the intersection of Scott Street and South McGregor Drive in the City of Houston." It was further charged that "said Simon Adams did then and there while engaged in said unlawful acts, by negligence and carelessness, and as a result of said unlawful acts, cause the death

of the said George Michael Conner by . . . causing and permitting his said automobile to collide with and strike" Conner, who was riding in another automobile. (Tr. 3-4.)

During the trial of the case, a state witness, Edd White, a police officer of the City of Houston assigned to the accident investigation division, testified that upon his arrival at the scene of the accident he saw the petitioner and asked him what happened. He testified that the petitioner said: "I was running too fast and didn't see the stop sign in time." White testified further that he "did not know then that he (petitioner) was the driver of this other car, and did not learn it at that time." (S. F. 48.)

F. M. Fabian, a sergeant of the Houston police department also assigned to the accident investigation squad, testified that he talked to petitioner at the hospital shortly after the accident and that at that time petitioner said "he was driving the car, and didn't stop at the stop sign because he was driving so fast he didn't see the stop sign." (S. F. 24.)

A jury having been waived, the trial court found petitioner guilty of negligent homicide of the second degree and assessed his punishment at one year in jail.

Petitioner appealed to the Court of Criminal Appeals of Texas, one of his complaints before that court being the admission in evidence of the above testimony of witness Fabian relating to the statement by the petitioner that he did not stop at the stop sign because he was driving so fast that he did not see it. The basis of petitioner's complaint, insofar as is here material, was that this statement was in-

admissible under Article 6687b, Section 42, and Article 6701d, Section 47, Texas Civil Statutes (Vernon 1948).

The Court of Criminal Appeals of Texas affirmed the judgment of the trial court, saying that the bill of exception relating to the above testimony of witness Fabian was deficient in that it fails to negative the fact that the statement made by appellant (petitioner) to the officer was not a part of the res gestae. . . ." 221 S. W. 2d at 265.

Petitioner's motion for rehearing was overruled, whereupon he filed his petition for a writ of certiorari.

POINT ONE

In a prosecution in a state court for a state crime, an infringement of the privilege against self-incrimination does not violate the due process clause of the Fourteenth Amendment.

Argument and Authorities

Article 6687b, Section 39, and Article 6701d, Section 44, Texas Civil Statutes (Vernon 1948), require written reports of motor-vehicle accidents to be made by the drivers of the vehicles involved and by the law enforcement officer who investigates such accidents. Article 6687b, Section 42, and Article 6701d, Section 47, provide that these accident reports "shall be without prejudice to the individual so reporting and shall be for the confidential use" of the Department of Public Safety or other state agencies having use of the records for accident prevention purposes. Ar-

ticle 6687b, Section 42, also provides that "No such report shall be used as evidence in any trial, civil or criminal, arising out of such accident. . . ." (See Appendix.)

The effect of the above statutes is to provide a privilege against self-incrimination with respect to these accident reports. Assuming, for the purpose of argument, that the oral statements of petitioner testified to by witnesses Fabian and White were inadmissible by virtue of these statutes, the admission in evidence of such statements would be an infringement of the privilege against self-incrimination.

That the privilege against self-incrimination is not a federal privilege or immunity protected by the Fourteenth Amendment against state invasion and that the infringement of this privilege by state action is not a denial of due process of law in violation of this amendment was first declared by this Court in *Twining v. New Jersey*, 211 U.S. 78 (1908). The question before the Court there was the constitutionality of a state law permitting an unfavorable inference to be drawn from the failure of a defendant in a criminal case to testify. In affirming a conviction in a case in which such an inference had been drawn, the Court said:

> "We conclude, therefore, that the exemption from compulsory self-incrimination is not a privilege or immunity of National citizenship guaranteed by this clause of the Fourteenth Amendment against abridgement by the States.
>
> "The defendants, however, do not stop here. They appeal to another clause of the Fourteenth Amendment, and insist that the self-incrimina-

tion, which they allege the instruction to the jury compelled, was a denial of due process of law. . . . (p. 99.)

". . . We think it is manifest, from this review of the origin, growth, extent and limits of the exemption from compulsory self-incrimination in the English law, that it is not regarded as a part of the law of the land of Magna Carta or the due process of law, which has been deemed an equivalent expression, but, on the contrary, is regarded as separate from and independent of due process. It came into existence not as an essential part of due process, but as a wise and beneficent rule of evidence developed in the course of judicial decision. This is a potent argument when it is remembered that the phrase was borrowed from English law and that to that law we must look at least for its primary meaning.

"But without repudiating or questioning the test proposed by Mr. Justice Curtis for the court, or rejecting the inference drawn from English law, we prefer to rest our decision on broader grounds, and inquire whether the exemption from self-incrimination is of such a nature that it must be included in the conception of due process. . . . The question before us is the meaning of a constitutional provision which forbids the States to deny to any person due process of law. In the decision of this question we have the authority to take into account only those fundamental rights which are expressed in that provision, not the rights fundamental in citizenship, state or National, for they are secured otherwise, but the rights fundamental in due process, and therefore an essential part of it. We have to consider whether the right

is so fundamental in due process that a refusal of the right is a denial of due process. . . . (pp. 105-107.)

". . . The inference is irresistible that it has been the opinion of constitution makers that the privilege, if fundamental in any sense, is not fundamental in due process of law, nor an essential part of it. We believe that this opinion is proved to have been correct by every historical test by which the meaning of the phrase can be tried. (p. 110.)

". . . for the reasons given, we think that the exemption from compulsory self-incrimination in the courts of the States is not secured by any part of the Federal Constitution." (p. 114.)

This principle that the privilege against self-incrimination is not protected by the Fourteenth Amendment was recognized again in *Palko v. Connecticut*, 302 U.S. 319 (1937), where the Court said:

"The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a 'principle of justice so rooted in traditions and conscience of our people as to be ranked as fundamental.' [Citations.] Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them. What is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination. *Twining v. New Jersey*, *supra*. This too might be lost, and justice still be done. Indeed, today as in the past there

> are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope, or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental. *Brown v. Mississippi, supra.* Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry. The exclusion of these immunities and privileges from the privileges and immunities protected against the action of the states has not been arbitrary or casual. It has been dictated by a study and appreciation of the meaning, the essential implications, of liberty itself." (pp. 325-326.)

It was reaffirmed in the recent case of *Adamson v. California*, 332 U.S. 46 (1947), where a California law, permitting the failure of a defendant to explain or to deny evidence against him to be commented upon by court and by counsel and to be considered by court and jury, was challenged as invalid under the Fourteenth Amendment. In sustaining the conviction, this Court said:

> "We reaffirm the conclusion of the *Twining* and *Palko* cases that protection against self-incrimination is not a privilege or immunity of national citizenship.
>
> "Appellant secondly contends that if the privilege against self-incrimination is not a right protected by the privileges and immunities clause of the Fourteenth Amendment against state action, this privilege, to its full scope under the Fifth Amendment, inheres in the right to a fair trial. A right to a fair trial is a right

admittedly protected by the due process clause of the Fourteenth Amendment. Therefore, appellant argues, the due process clause of the Fourteenth Amendment protects his privilege against self-incrimination. The due process clause of the Fourteenth Amendment, however, does not draw all the rights of the federal Bill of Rights under its protection. That contention was made and rejected in *Palko v. Connecticut*, 302 U.S. 319, 323. It was rejected with citation of the cases excluding several of the rights, protected by the Bill of Rights, against infringement by the National Government. Nothing has been called to our attention that either the framers of the Fourteenth Amendment or the states that adopted intended its due process clause to draw within its scope the earlier amendments to the Constitution. *Palko* held that such provisions of the Bill of Rights as were 'implicit in the concept of ordered liberty,' p. 325, became secure from state interference by the clause. But it held nothing more.

"Specifically, the due process clause does not protect, by virtue of its mere existence, the accused's freedom from giving testimony by compulsion in state trials that is secured to him against federal interference by the Fifth Amendment. *Twining v. New Jersey*, 211 U.S. 78, 99-114; *Palko v. Connecticut, supra*, p. 323 . . . . California follows Anglo-American legal tradition in excusing defendants in criminal prosecutions from compulsory testimony. . . . That is a matter of legal policy and not because of the requirements of due process under the Fourteenth Amendment." (pp. 53-55.)

The only decision of this Court relied upon by petitioner is *Mooney v. Holohan*, 294 U. S. 103 (1935), which contains dictum to the effect that use by the state of testimony known to be perjured to obtain a conviction constituted a denial of due process of law. Such action is clearly violative of due process of law. However, the subsequent decisions of this Court in *Palko v. Connnecticut* and *Adamson v. California*, *supra*, show that the dictum in *Mooney v. Holohan* has no application in a case, such as the present one, involving the privilege against self-incrimination.

There having been no denial by the proceedings in the Texas courts of any right secured by the Constitution of the United States, the case presents no question for review by this Court.[1] As said in *Twining v. New Jersey*, *supra*, at 91:

> "If the right here asserted is not a Federal right, that is the end of the case. We have no authority to go further and determine whether the state court has erred in the interpretation and enforcement of its own laws."

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[1] *Rogers v. Peck*, 199 U.S. 425, 434 (1905); *Franklin v. South Carolina*, 218 U.S. 161, 164-165 (1910); *Barrington v. Missouri*, 205 U.S. 483, 488 (1907); *Twining v. New Jersey*, 211 U.S. 78, 91 (1908); *Iowa Central Ry. v. Iowa*, 160 U.S. 389 (1896); *McNulty v. California*, 149 U.S. 645 (1893); *Neblett v. Carpenter*, 305 U.S. 297, 302 (1938); *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 166 (1917); *Lloyd v. Matthews*, 155 U.S. 222, 227 (1894); *Commercial Bank of Cincinnati v. Buckingham's Executors*, 5 How. 317, 342-343 (U.S. 1846); *King v. West Virginia*, 216 U.S. 92, 101 (1910); *Los Angeles Farming & Milling Co. v. Los Angeles*, 217 U.S. 217, 226 (1910); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 680 (1930).

In *Franklin v. South Carolina*, 217 U.S. 161 (1910), a case involving the composition of a grand jury, the Court said:

> "In a proceeding of this kind this court has no jurisdiction to notice other errors than those which involve alleged violations of Federal rights secured by the Constitution of the United States or Federal statutes. The States have the right to administer their own laws for the prosecution of crime, and the jurisdiction of this court extends only to the reversal of such state proceedings where fundamental rights secured by the Federal law have been denied by the proceedings in the state courts. *Rogers v. Peck*, 199 U.S. 425, 434, and cases there cited." (pp. 164-165.)

POINT TWO

Even if a right secured by the Constitution of the United States had been denied by the proceedings in the state courts, it would not be subject to review in this case, because petitioner did not assert a federal constitutional right in the state courts.

Argument and Authorities

No claim was made at any time in the state courts that the admission of the evidence in question was in violation of any provision of the Constitution of the United States. Now, in his petition for writ of certiorari, petitioner seeks for the first time to raise a federal question. This he may not do, for the principle is well established that "this Court acquires no jurisdiction to review the judgment of a state

court of last resort . . . unless it affirmatively appears upon the face of the record that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court."[2]

CONCLUSION

It is respectfully submitted that this case is not a proper one for review by this Court and that the petition for writ of certiorari should be denied.

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November, 1949.

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[2] *Mellon v. O'Neil*, 275 U.S. 212, 214-215 (1927); *Whitney v. California*, 274 U.S. 357, 360 (1927); *Dewey v. Des Moines*, 173 U.S. 193, 198-199 (1899); *Southwestern Bell Telephone Co. v. Oklahoma*, 303 U.S. 206, 212 (1938); *Brooks v. Missouri*, 124 U.S. 394, 395 (1888); *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655 (1897); *Baldwin v. Kansas*, 129 U.S. 52, 56-57 (1889); *New York Life Ins. Co. v. Hendren*, 92 U.S. 286 (1875); *Leeper v. Texas*, 139 U.S. 462 (1891).

APPENDIX

TEXAS CIVIL STATUTES

Article 6687b, Section 39: "Every person involved in an accident resulting in death, injury, or apparent property damage of Fifty Dollars ($50) or more where one or more motor vehicles are involved and who is the holder of an operator's, commercial operator's, or chauffeur's license, under the provisions of this Act, shall make a report of such accident to the Department of Public Safety within forty-eight (48) hours. Refusal to make such report shall render the holder of such license liable to suspension or revocation of such license. Reports required by this Section shall be deemed privileged communications."

Article 6687b, Section 42: "All required accident reports shall be without prejudice to the individual so reporting and shall be for the confidential use of the Department except that the Department may disclose the identity of a person involved in an accident when such identity is not otherwise known or when such person denies his presence at such accident. No such report shall be used as evidence in any trial, civil or criminal, arising out of such accident, except that the Department shall furnish upon request of any person who has, or claims to have, made such a report or upon demand of any court, a certificate showing that a specified report has or has not been received by the Department, solely to prove a compliance or failure to comply with the requirement that such report be made to the Department."

Article 6701d, Section 44: "(a) The driver of a vehicle involved in an accident resulting in injury to or death of any person or total property damage

to an apparent extent of Twenty-five ($25.00) Dollars or more shall, within twenty-four (24) hours after such accident, forward a written report of such accident to the department.

"(b) The department may require any driver of a vehicle involved in an accident of which report must be made as provided in this Section to file supplemental reports whenever the original report is insufficient in the opinion of the department and may require witnesses of accidents to render reports to the department.

"(c) Every law enforcement officer, who, in the regular course of duty, investigates a motor-vehicle accident of which report must be made as required in this Section, either at the time of and at the scene of the accident or thereafter by interviewing participants or witnesses shall, within twenty-four (24) hours after completing such investigation, forward a written report of such accident to the department."

Article 6701d, Section 47: "All accident reports made by persons involved in accidents, by garages, or peace officers shall be without prejudice to the individual so reporting and shall be for the confidential use of the department or other State agencies having use for the records for accident prevention purposes, except that the department may disclose the identity of a person involved in an accident when such identity is not otherwise known or when such person denies his presence at such accident."

TEXAS CRIMINAL STATUTES

Article 1239: "Negligent homicide of the second degree can only be committed when the person guilty thereof is in the act of committing or attempting the commission of an unlawful act."

Article 1240: "Within the meaning of an 'unlawful act' as used in this chapter are included:

1. Such acts as by the penal law are called misdemeanors; and

2. Such acts, not being penal offenses, as would give just occasion for a civil action.